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ANN BAVENDER*
ANNE GOODWIN CRUMP
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RICHARD J. ESTEVEZ
PAUL J. FELDMAN
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ERIC FISHMAN
RICHARD HILDRETH
FRANK R. JAZZO
ANDREW S. KERSTING*
EUGENE M. LAWSON, JR.
HARRY C. MARTIN
GEORGE PETRUTSAS
LEONARD R. RAISH
JAMES P. RILEY
KATHLEEN VICTORY
HOWARD M. WEISS
*NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW
11th FLOOR, 1300 NORTH 17th STREET
ARLINGTON, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

www.fhh-telcomlaw.com

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FRANK U. FLETCHER
(1939-1985)
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(1956-1983)
PAUL J. SPEARMAN
(1936-1987)
FRANK ROBERSON
(1936-1961)
RUSSELL ROWELL
(1948-1977)

RETIRED
EDWARD F. KENEHAN

CONSULTANT FOR INTERNATIONAL AND
INTERGOVERNMENTAL AFFAIRS
SHELDON J. KRYSS
U. S. AMBASSADOR (ret.)

OF COUNSEL
EDWARD A. CAINE*
MITCHELL LAZARUS*
EDWARD S. O'NEILL*
JOHN JOSEPH SMITH

WRITER'S DIRECT

703-812-0440

lazarus@fhh-telcomlaw.com

September 14, 1998

HAND DELIVERED

Magalie R. Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

Re: CC Docket No. 98-146

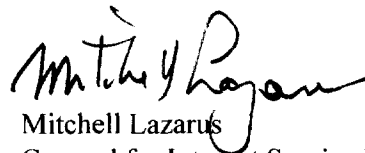
Dear Ms. Salas:

Enclosed are the original and nine (9) copies of the Comments of the Internet Service Providers' Consortium for filing in the above-referenced docket.

Kindly date-stamp and return the extra copy of this cover letter.

If there are any questions about this filing, please call me at the number above.

Respectfully submitted,


Mitchell Lazarus

Counsel for Internet Service Providers' Consortium

ML:deb

Enclosures

cc: Service List
Ms. Deb Howard, ISPC
Ms. Roxanna Loveday, ISPC
Mr. Charles T. Smith, Jr., ISPC
Mr. Justin Newton, ISPC
Kathryn A. Kleiman, Esq.

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Before the
Federal Communications Commission
Washington DC 20554

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SEP 14 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Inquiry Concerning the Deployment of)
Advanced Telecommunications Capability)
to All Americans in a Reasonable and Timely)
Fashion, and Possible Steps to Accelerate)
Such Deployment Pursuant to Section 706)
of the Telecommunications Act of 1996)

CC Docket No. 98-146

**COMMENTS OF
THE INTERNET SERVICE PROVIDERS' CONSORTIUM**

Of Counsel:
Kathryn A. Kleiman
INTERNET MATTERS
P.O. Box 25876
Alexandria VA 22313
703-518-5184

Mitchell Lazarus
FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209
703-812-0440

September 14, 1998

Counsel for
The Internet Service Providers' Consortium

SUMMARY

The Internet Service Providers' Consortium (ISP/C) is the voice of independent ISPs. Its members welcome the deployment of new technologies, including DSL. As telecommunications facilities and services improve, the ISPs can improve the services they deliver to their customers. But the independent ISPs urge careful Commission oversight of new data offerings from the ILECs. The RBOCs and GTE not only are competitors of the independent ISPs for the same retail ISP customers, but are also essential providers to most ISPs, which depend on the RBOCs or GTE for local loops and data lines. This combination gives the RBOCs and GTE both the incentive and the opportunity to discriminate against independent ISPs.

DSL is a basic service under Computer III, and so is fully subject to ONA requirements. The RBOCs and GTE therefore must unbundle DSL and make it available to competing ISPs at nondiscriminatory rates, terms, and conditions.

The Commission has proposed to allow the ILECs to meet their Section 251 unbundling and resale obligations by providing DSL service through structurally separate affiliates. Although such an arrangement should help to protect CLECs from anticompetitive behavior, it will do nothing to protect the "pure ISPs" — those that are not also CLECs. Thus, the ONA regime is still needed under the Commission's separation proposal, and ONA obligations must apply to the RBOC or GTE affiliate just as they do to the parent company. Moreover, the imposition of ONA safeguards will continue to be necessary even if CLECs enter the DSL market. Without ONA controls on the RBOC or GTE, a rational CLEC has every incentive to overcharge independent ISPs for DSL, at or near the RBOC/GTE level, while providing DSL to its own ISP operations at much lower rates.

Some ISPs have had trouble in the past with delayed or inferior service from RBOCs and GTE, and with overcharges and improper marketing practices. Typically such offenses do not justify the cost and disruption of a Section 208 proceeding, but they represent a significant degree of cost and frustration to the ISPs. The Commission should maintain a web page on which an ISP can lodge copies of protests sent to the local RBOC or GTE, and where the carrier can place copies of any replies. Knowing the Commission has been told of an allegation might help motivate the carrier to resolve it promptly, or to deny it in specific terms. Moreover, either the ISPs or the Commission can tabulate the incidence of allegations to identify locations or services that may need closer regulatory attention. And, if all else fails, the accumulated data may narrow the issues for a Section 208 complaint.

Finally, the Commission should let the market optimize the number of ISPs, continue to prohibit the bundling of transmission services with enhanced services, and for the time being not intervene in private peering arrangements.

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**COMMENTS OF
THE INTERNET SERVICE PROVIDERS' CONSORTIUM**

The Internet Service Providers' Consortium (ISP/C) hereby submits these Comments in response to the Notice of Inquiry in the above-captioned proceeding.¹

I. INDEPENDENT ISPS ARE A VITAL PATHWAY IN THE DELIVERY OF INTERNET SERVICES.

Internet Service Providers (ISPs) provide retail-level access to the Internet to anyone with a computer and a phone line or other means of connection. Without the ISPs, only entities large enough to maintain their own networks could have Internet access. ISPs make the Internet universal and ubiquitous.

Independent ISPs are ISPs *other than* carriers like the RBOCs and GTE, on-line content providers like AOL, and entities entangled with other interests, such as Microsoft Network. In

¹ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Notice of Inquiry, FCC 98-187 (released Aug. 7, 1998) ("Notice").

addition to serving consumers, independent ISPs typically work with the small businesses of their communities — companies and organizations that lack their own information services personnel and Internet expertise, and hence often demand considerable attention and resources from their ISPs. Many of these subscribers require assistance with individualized installations and employee training, and depend on web sites designed and maintained by the ISP for their presence on the Internet. Some ISPs specialize in serving particular industries, and are able to offer industry-specific subject-matter expertise along with conventional Internet services. Together, small-business subscribers average about 85% of an independent ISPs' institutional customers. The independent ISPs can offer them levels of time and energy that the large, nationwide providers could never muster.

Independent ISPs can also give individual attention to their individual subscribers. Reaching out to their communities, independent ISPs create classes, software, and texts to assist the elderly, youth, and other populations who tend to be fairly late entrants to the Internet. Further, many independent ISPs have long translated their interest in community affairs into Internet access for local governments, schools, and libraries, including technical support and training, sometimes through reduced-charge or free accounts. In short, the independent ISPs focus closely on their local communities and respond to local needs.

Independent ISPs are a small-business success story in their own right. From only a handful of ISPs in 1995, the industry has grown to between 5,000 and 7,500 independent ISPs in the United States today. About 85% are themselves small businesses. Their average revenues are about \$375,000, and most have between one and ten employees. Collectively, they account

for 50 percent of the U.S. ISP market. They also create an increasing number of highly skilled technical positions in the United States and abroad.

The independent ISPs have helped to make the Internet the fastest-growing communications medium in the history of civilization. Years before the telephone companies and other large providers showed any interest, it was the independent ISPs — some of them launched by the same people who helped to create the Internet — that risked their own assets to develop the growth market of the decade. They are still the only means of access to the Internet by a local call in most rural and small-market areas. Everywhere, the independent ISPs contribute more than their share of the vitality and diversity that enables millions of people to use the Internet daily to improve and enrich their lives.

About the Internet Service Providers' Consortium. The ISP/C is the largest trade association for small to mid-size ISPs and other members of the Internet services industry. (A list of members is attached as Appendix A.) Founded in 1996, the ISP/C includes more than 199 company members, up 200 percent in the last year alone. ISP/C members provide local and backbone Internet access, online content, and hardware and software for the industry. Members are headquartered in more than 42 U.S. states and 10 countries, with over 1 million subscribers in the aggregate. Most members serve local or regional markets, and increasingly specialize in services for specific industries.²

The ISP/C welcomes members regardless of size and geographic location. It has emerged as the voice for independent ISPs.

² Additional information about the ISP/C is available at <http://www.ISPC.org>.

II. MOST INDEPENDENT ISPs BOTH COMPETE WITH AN RBOC OR GTE, AND DEPEND ON FACILITIES OF THE SAME RBOC OR GTE, AND SO ARE VULNERABLE TO UNLAWFUL DISCRIMINATION.

ISPs welcome this proceeding, and any other action that advances the quality and ubiquity of telecommunications. DSL is but one example of an emerging telecommunications technology that will enable ISPs and other service providers to enhance their customers' opportunities for business, entertainment, and recreation.³

The ISPs' enthusiasm for innovation has a caveat, however, as to new services delivered by the incumbent LECs. Many ILECs, including all of the RBOCs and GTE, are themselves in the ISP business, and compete directly with independent ISPs for the same retail Internet customers. But the RBOCs and GTE are not only competitors of the independent ISPs — they are also essential providers to the vast majority of ISPs. Most independent ISPs depend on an RBOC or GTE for the multiple local loops, and other facilities, that customers must use to dial in, and for data lines that connect the ISPs to the Internet backbone. The RBOCs and GTE thus have every opportunity — and every incentive — to misuse their facilities monopoly to discriminate against independent ISPs in order to build up their own ISP businesses.

These concerns are not merely theoretical. Many independent ISPs can provide detailed accounts of RBOC and GTE behavior that an impartial observer would have to describe as intentional discrimination. These include:

³ The term DSL is used here to denote a family of technologies that deliver high-speed digital access over existing copper local loops. The form nearest to widespread commercial application is ADSL (asymmetric digital subscriber line), characterized by fast transmission downstream, from service provider to subscriber, and relatively slow transmission in the opposite direction.

- substantial delays in furnishing of additional lines, while the RBOC or GTE expands its own ISP operations;
- identification of the independent ISP's customers for marketing of the carrier's ISP services;⁴
- routinely forwarding callers who ask about the carrier's support of new transport technologies to the carrier's own ISP operation;
- selective degrading of service on independent ISP dial-up business lines;⁵ and
- marketing "improved" or "reliable" ISP service to customers of the independent who are frustrated by problems resulting from degraded RBOC/GTE lines.

Absent restraints, a carrier's exercise of rational self-interest, coupled with its facilities monopoly, will inevitably lead it to discriminate in order to hinder competition. Indeed, the carrier's duty to its shareholders requires it to maximize profit — within regulatory constraints. The Commission has long recognized that anticompetitive behavior on the part of carriers must be restrained through appropriate regulation, at least until competition becomes strong enough to exert control through market forces. Without regulation in the interim, real competition will never have a chance to emerge.

The introduction of new telecommunications technologies, such as DSL, does not alter the potential for anticompetitive abuse.⁶ Just ten days ago, the Washington Post reported that

⁴ A carrier's benefitting from its knowledge that particular subscribers connect to an independent ISP violates the rules governing customer proprietary network information (CPNI). "A telecommunications carrier may not use, disclose or permit access to CPNI to identify or track customers that call competing service providers." 47 C.F.R. § 64.2005(b)(2).

⁵ Some ISPs also report abuse of the carrier's repair and maintenance procedures to reposition or redeploy facilities used by the ISP without notifying the ISP.

⁶ As explained below, the pending proposal that would allow the ILECs to avoid Section 251 regulation by offering DSL through affiliates, rather than through the ILECs

Bell Atlantic is charging customers of Bell Atlantic's own ISP less than \$200 for ADSL service connection, modem, and installation, while charging customers of independent ISPs \$523 — more than 2.5 times as much — for exactly the same elements.⁷ Worse, independent ISPs have been unable to obtain DSL service from Bell Atlantic even at these discriminatory rates. One ISP representative told the Washington Post that he has "'chased (Bell Atlantic) left and right,' in an effort to find out about how to get ADSL service, . . . [but] has heard 'not a peep' from Bell Atlantic despite his efforts."⁸ Many independent ISPs accustomed to dealing with RBOCs or GTE will be unsurprised.

In short, any plans to permit the RBOCs or GTE to offer new telecommunications technologies, such as DSL, whether by the carrier itself or through a subsidiary, must include safeguards to prevent anticompetitive practices, and some means to enforce those safeguards.

themselves, will not protect the ISPs against anticompetitive practices. Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-11, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC 98-188 (released Aug. 7, 1998) ("Section 706 NPRM").

⁷ Mike Musgrove, *ADSL: Surf's Up?*, Washington Post, Sept. 4, 1998, at N70. The article is attached as Appendix B.

⁸ *Id.*

III. THE COMMISSION MUST REQUIRE THE RBOCs AND GTE TO PROVIDE DSL TO COMPETING ISPs ON A NONDISCRIMINATORY BASIS.

1. DSL Is Fully Subject to Computer III ONA Requirements.

DSL is a basic service.⁹ The Commission has long defined a basic service as

“a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.”¹⁰

DSL squarely fits this definition. It is pure transport, carrying the customer’s data from the customer’s premises to a customer-selected destination with no net change. Even though DSL uses more sophisticated transmission methods than does plain old analog-over-voice, this has no bearing on its status as a basic service. Having long treated packet-switched transmission (for example) as a basic service,¹¹ the Commission cannot consistently hold otherwise as to DSL.

⁹ This pleading speaks in terms of DSL because, among new telecommunications technologies, DSL will require the earliest attention from the Commission. But the principles laid out here are not restricted to DSL. To the contrary, they apply to any telecommunications technology provided by a dominant carrier and capable of connecting a customer to an enhanced service provider, such as an ISP.

¹⁰ Second Computer Inquiry, 77 F.C.C.2d 384, 420 (1980). DSL also comes within the definition of “telecommunications” set out in the Telecommunications Act of 1996: “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). For purposes of this pleading, the two definitions are coextensive.

¹¹ Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 2449, 2460 n.28 (1988) (“[Accunet Packet Service] is a packet-switched data transmission service that does not include protocol processing and is classified as a basic service.”)

Because DSL is a basic service, it is fully subject to Computer III ONA requirements. These impose specific obligations on the RBOCs and GTE:¹² The carrier must unbundle DSL and make it available to competing ISPs at nondiscriminatory rates, terms, and conditions.¹³

The September 4 Washington Post article quoted above aptly illustrates the need for Computer III safeguards in the provisioning of DSL. If Bell Atlantic were in compliance with Computer III, it would have made ADSL promptly available to competing ISPs, and would be charging the same start-up costs for customers of all ISPs, whether its own or others. But we do not know of any case in which Bell Atlantic has made ADSL promptly available to a requesting ISP at equitable rates. Computer III would deprive Bell Atlantic's ISP of its unfair advantage owing to affiliation with the local monopoly facilities provider. Bell Atlantic would not be hindered in any way, except by having to compete with the independent ISPs on equal terms.

2. The Computer III Safeguards Must Apply To the RBOCs and GTE DSL Affiliates As Well As To the Regulated Companies.

The Commission has proposed to offer the incumbent LECs, including the RBOCs and GTE, an alternative way to satisfy their Section 251 unbundling and resale obligations, by providing DSL service through structurally separate affiliates.¹⁴ A parent ILEC that seeks to

¹² The RBOCs became subject to Computer II on the eve of AT&T divestiture, BOC Separation Order, 95 F.C.C.2d 1117 (1983), and subsequently accepted the Computer III ONA regime in lieu of Computer II structural separation. GTE was separately brought under Computer III regulation in 1994. Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, 9 FCC Rcd 4922 (1994).

¹³ Under the separate requirements of Section 251, the carrier must also unbundle packet-switched and other transport from its central office to subsequent destinations, and make it available to CLECs.

¹⁴ Section 706 NPRM.

obtain DSL will have to stand in line with the CLECs, an arrangement that would facilitate detecting discrimination in the parent's favor. Moreover, the affiliate will have an incentive to make DSL widely available to all comers, because that will tend to maximize the parent's revenues.

Even if this arrangement adequately protects the CLECs, however, it will do nothing to safeguard "pure" ISPs — ISPs that are not also CLECs. A pure ISP, not being a CLEC, is not eligible to take service under Section 251.¹⁵ Instead, the ISP still must either go to the parent ILEC for service, or subscribe to a CLEC, if there is one in the market offering DSL. Analyzing the need for Computer III safeguards is a little different with and without an available CLEC, but the outcome is the same.

Case 1 — Only the RBOC or GTE affiliate offers DSL. This is the case addressed in Paragraph 38 of the Notice. It is commonplace in rural and other lightly populated areas, where CLEC service is rare and the ILEC will remain the sole provider into the foreseeable future. As noted above, allowing an RBOC or GTE to offer unregulated DSL though an affiliate offers no protection to ISPs. The ISP still must take service from the parent carrier, at whose hands it is still subject to exactly the same potential for anticompetitive behavior as if the RBOC or GTE itself provided DSL. Thus, even with the structural separation proposed in Docket No. 98-11, the Computer III safeguards remain fully necessary.

¹⁵ The Commission has proposed to offer pure ISPs the same "section 251-type unbundling" access rights as CLECs. Computer III Further Remand Proceedings, 13 FCC Rcd 6040, 6091 (1998). Even if the Commission adopts that proposal, however, many ISPs may opt as a business decision to take service through the ILEC or a CLEC. They should have the right to make that choice without thereby subjecting themselves to anticompetitive conduct.

Case 2 — One or more CLECs offer DSL in competition with the RBOC or GTE. The existence of DSL CLECs in the market means only a marginal improvement for independent ISPs, especially if there are just a few CLECs. True, taking service through an RBOC or GTE affiliate should enable the *CLEC* to obtain DSL service at competitive rates. But nothing requires the CLEC to *pass on* those competitive rates to an independent ISP. To the contrary, if a CLEC itself offers ISP service, as many do, then the CLEC has little to gain by pricing its DSL service below RBOC or GTE rates. The CLEC's means and motive for anticompetitive behavior are identical to the RBOC's or GTE's. The CLEC, of course, is not subject to Computer III. It will rationally keep its prices to independent ISPs at or near the RBOC/GTE level, while providing DSL to its own ISP services at much lower rates.

Moreover, even a CLEC that does not offer its own ISP services may have good reason to keep its prices near RBOC/GTE rates. Its only disincentive is the possibility of being undersold by the RBOC or GTE (or another CLEC). But consider the choices available to an ILEC, in the presence of a CLEC. The ILEC could lower DSL rates to compete with the CLEC, and possibly sell more DSL. More likely, however, it will keep DSL rates high for the independents, thereby raising the independents' cost of doing business, and very likely sign up more ISP customers at their expense. The CLEC knows that a rational ILEC will prefer that option, because the ILEC will make more money that way. Thus, the CLEC knows it can safely charge artificially high DSL rates to independent ISPs without fear of real competition from the RBOC or GTE.¹⁶

¹⁶ Paragraph 79 of the Notice asks how the Commission can ensure a competitive ISP market in markets where there are more ISPs than providers of last-mile facilities. The only providers of last-mile facilities other than CLECs that are likely to achieve significant market penetration in the foreseeable future are cable operators. Like the CLECs, they will have no real incentive to set a competitive price for Internet carriage unless the RBOC/GTE pricing is restrained. And, to the extent cable operators market their own ISP services, they have an

In the long run, to be sure, the emergence of multiple CLECs will tend to bring DSL rates down to a competitive level. But that will take considerable time, and may never happen outside the largest markets. In the meantime, the only way to ensure a functioning market for ISP services is to require the RBOCs and GTE to unbundle DSL and provide it to competing ISPs on nondiscriminatory terms. Obviously this rule must apply even if the RBOC or GTE takes DSL from an affiliate, or it can have no effect at all.

In the same vein, the RBOCs and GTE cannot be permitted to evade Computer III by offering ISP services through the same affiliate that provides DSL. An RBOC might try to argue that only the regulated company is subject to the Computer III unbundling and nondiscrimination requirements, and that an affiliate providing both DSL and ISP services need not offer DSL at nondiscriminatory rates — or offer it at all — to independent ISPs. This argument would try to use the protections proposed in Docket No. 98-11 to undercut those guaranteed by Computer III. The Computer III requirements for unbundling and nondiscriminatory provision must apply no matter how an RBOC or GTE distributes DSL and ISP offerings among its corporate entities.

An RBOC or GTE may object to both the imposition of structural separation, which is somewhat reminiscent of Computer II, and the simultaneous imposition of Computer III safeguards, which historically replaced Computer II structural separation. But this objection has no merit. Computer II structural separation, and that proposed in Docket No. 98-11, serve very different purposes. Computer II protected competing providers of *enhanced* service. Those

affirmative disincentive to provide high-speed carriage to independent ISPs at competitive rates. Other potential last-mile providers (such as MMDS, LMDS, and satellite) do not yet have a foreseeable market share adequate to offer significant competitive alternatives.

providers still need Computer III. Structural separation under Docket No. 98-11 will protect competing providers of *basic* service. The growth and maintenance of competition in both basic and enhanced services require the operation of both controls, at least for the present.

3. The Commission Should Institute a Procedure for Monitoring RBOC and GTE Compliance With Computer III Safeguards.

Independent ISPs with a lot of experience in requesting Computer III BSA and BSE services from the RBOCs and GTE report two frequent problems. First, RBOC and GTE field personnel are often unaware of their obligation to provide services that their Washington lawyers would doubtless agree are required. From the ISP standpoint, this appears to be largely an issue of inadequate training within the carrier organizations. Second, as noted in Part II above, the ISPs have seen many instances of apparent CPNI violations, particularly the use of calling data to identify marketing targets for the RBOC's and GTE's own ISP services. These problems will no doubt continue to occur as additional technologies come under the Computer III umbrella.

Typically such instances of carrier misconduct, taken individually, do not justify the cost and disruption of a full-scale Section 208 proceeding. In the aggregate, on the other hand, they represent a significant degree of cost and frustration to the independent ISPs. ISP/C therefore asks the Commission to establish an alternative to Section 208 procedures that is less formal, and less expensive to all parties, for monitoring allegations of RBOC and GTE violations and the carriers' responses.

Specifically, ISP/C proposes that the Common Carrier Bureau add an area to its Internet web page in which an ISP can electronically lodge copies of protests sent to the local RBOC or

GTE, in cases where the ISP believes the carrier has not fulfilled its obligations. Accompanying the document would be a list of key terms including name of the ISP, name of the carrier, location, service at issue, date, and a few words summarizing the allegation. The web page would automatically assign a case number. The RBOC or GTE would be encouraged to lodge a copy of its reply, if any, under the same case number, and the ISP could continue the exchange if necessary. The depository would be available for public inspection, with participants asked not to post material they identify as proprietary or otherwise entitled to nondisclosure under the Freedom of Information Act.

Such a depository would require virtually no attention from the Commission, once established, and would cost almost nothing to maintain. But it would serve several useful purposes. First, knowing that the Commission has been informed of an allegation might help motivate the carrier to resolve it promptly, or to deny it in specific terms. Second, either the Commission or private parties can easily tabulate the incidence of allegations in particular locations, or as to particular services, and use any emerging patterns to identify issues needing attention. For example, if ISPs in a particular city complained of noisy lines at a rate far higher than ISPs in other cities, the ISPs could ask the Commission to seek an explanation from the carrier. Finally, if all else fails, the accumulated data may narrow the issues for a Section 208 complaint, and may also help to satisfy the requirements for pre-filing settlement discussions and specificity in pleadings.¹⁷

¹⁷ See Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, 12 FCC Rcd 22497, 22516-17, 22534-38 (1997).

IV. THE NOTICE MAKES SUGGESTIONS WHICH, IF IMPLEMENTED, WOULD SERIOUSLY IMPAIR COMPETITION

The Notice raises three distinct issues on which the Commission should take no action.

1. The Existence of Multiple ISPs is Unquestionably in the Public Interest.

Paragraph 38 of the notice asks, "[I]s access by retail customers to thousands of ISPs in the public interest?"

ISP/C is dismayed that the Commission would seriously raise this question. It smacks of "central planning" of a kind that this country has long held in disrepute. No federal agency could plausibly challenge the public interest in having thousands of printed publications available, or thousands of radio stations, or (for that matter) thousands of dry cleaners or florists or video stores. If in fact there are too many vendors in any particular category, a competitive market will soon eliminate the surplus.

In any event, the reference to "thousands of ISPs" is misleading. Apart from a few national enterprises like AOL and Microsoft Network, the vast majority of ISPs operate over limited geographical areas. Outside the major metropolitan areas, most people have local access to only one or a handful of ISPs, while city residents might choose from among one or two dozen at most. The Washington DC area is hardly representative, having one of the richest concentrations of ISP service in the country, including some companies that rank among the Internet's pioneers.

Even in the well-served urban regions, many independent ISPs flourish by specializing in serving businesses within particular industries. Through specific understanding of the industry,

they can offer a level of custom service not available through larger Internet providers. By identifying and filling such niches, small ISPs have helped to bring power and variety to the Internet, and they will continue doing so in the future. The Commission can best encourage the market to optimize the number and distribution of ISPs by making sure that it operates free of distortions attributable to the RBOC and GTE facilities monopolies, as described above.

2. The Commission Should Continue To Prohibit the Bundling of Transmission Services with Enhanced Services.

Paragraph 82 of the Notice asks whether the Commission should depart from its prohibition of bundling transmission services with enhanced services.¹⁸

The prohibition remains fully appropriate. To remove it in advance of true facilities-based competition for local services would provide both the means and the incentive for misuse of the facilities monopoly in the otherwise competitive market for enhanced services. Moreover, to permit bundling would seriously hinder enforcement of the Computer III requirements intended to prevent discrimination against competing providers of enhanced services.

3. The Commission Should Not Intervene in Peering Arrangements at This Time.

Paragraph 79 of the Notice asks what the Commission should do to "preserve efficient peering arrangements among Internet companies, especially in the face of consolidations of large proprietary gateways."

¹⁸ The same paragraph also asks about bundling of CPE, an issue on which ISP/C takes no position.

The answer for now is: nothing. ISP/C urges the Commission to refrain from intervening in private peering arrangements. In light of the background information presented below, however, Commission involvement may become necessary at some time in the future.

Peering is a private arrangement among ISPs that allows the transit of data between their respective networks. These relationships permit subscribers of different ISPs to exchange email, files, and other data, and to view one another's web sites. Peering gives the customers of any ISP, regardless of size and location, access to the whole Internet.

ISPs have traditionally viewed peering as a necessary function of network operations, not as a profit-making activity. As the Internet evolves, however, peering agreements and relationships are changing. Public exchanges, which allow many ISPs to share connections and peer with each other, have become overloaded. Private exchanges and peering points are becoming increasingly common. The fundamental aspect of each peering agreement, however, remains the contract between ISPs to share data. ISP/C sees no reason for the FCC to intervene in these private business relationships for now.

One aspect of peering arrangements may cause concern in the future, however: the merger and consolidation of some of the largest ISPs (and backbone providers) with each other, and with telephone companies. These entities have the potential to limit their exchange of Internet traffic to themselves and one another, and to freeze out smaller ISPs. Another threat to the vigorous market for ISP services is a possible move among the larger ISPs toward imposing unreasonable charges on the smaller ones for peering, while peering with one another at no charge. Any such decisions would restrict access to the Internet, cause grave disruption to the ISP industry, and limit consumer choice.

Commission involvement at this time would be premature, however, as actions among the largest ISPs do not yet rise to the level of anticompetitive activity. ISP/C, and no doubt others as well, will move for appropriate intervention if the need arises. In the meantime, we ask the Commission to continue its monitoring, and to resist taking any action that would tip the already precarious balance any further against the smaller ISPs.

CONCLUSION

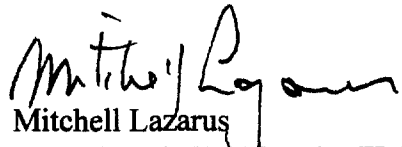
Independent ISPs are vulnerable to unlawful discrimination by the RBOCs or GTE because most of them have to compete with the RBOCs or GTE , but are simultaneously dependent on RBOC- or GTE-provided facilities for delivery of services to customers. The combination makes the independent ISPs extremely vulnerable to unlawful discrimination — a paradigmatic instance of the situation that made Computer II/III necessary.

ISP/C therefore asks the Commission to maintain the Computer III ONA provisions as new technologies appear. DSL is one example of a new-technology basic service that should remain subject to ONA obligations. And, if the Commission ultimately adopts its proposal to permit the ILECs to meet their Section 251 obligations by providing DSL through a separate subsidiary, the ONA requirements must apply nonetheless. ISP/C has proposed a simple and inexpensive system to aid in monitoring compliance.

Finally, the Commission should allow the market to set the optimum number of ISPs, maintain the prohibition against bundling enhanced service with transmission, and for the present refrain from involvement in peering arrangements.

Respectfully submitted,

Of Counsel:
Kathryn A. Kleiman
INTERNET MATTERS
P.O. Box 25876
Alexandria VA 22313
703-518-5184


Mitchell Lazarus
FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209
703-812-0440

September 14, 1998

Counsel for
The Internet Service Providers' Consortium

APPENDIX A

ISP/C MEMBERS

COMPANY

LIASON, CITY, STATE, COUNTRY

.NU Domain LTD	Bill Semich, Sherborn, MA, US
2 Cow Herd Internet Services	Deb Howard, Venice, CA, US
3Com Corporation / US Robotics	Katherine Sawyer, Mt. Prospect, IL US
AboveNet Communications	Justin Newton, San Jose, CA, US
ABSnet Internet Services, Inc.	Marc Siegel, Baltimore, MD, US
AcroNet Professional Internet Services Inc.	Chris Pappe, Kenosha, WI, US
Affordable Connections Internet Company	Tom Weems, Pt. Charlotte, FL, US
AlaNet Internet Services, Inc.	Jennifer Watts, Dothan, AL, US
Alegany.com Internet Services, Inc.	Oran Stewart, Warren, PA, US
Alpine Internet	Richard Hodges, Carson City, NV, US
Applied Personal Computing, Inc.	Kevin J. Sawyer, Fairview Heights, IL, US
Arisian Software	Mark Velasquez, Jupiter, FL, US
Astroarch Consulting, Inc.	Edward Haletky, Austin, TX, US
AT&T Networked Commerce Services	Neville O'Reilly, Bridgewater, NJ, US
Atlantech Online, Inc.	Edward J. Fineran, Silver Spring, MD, US
Atlas Communications	Steve Powell, Springfield, MO, US
Bay Networks	Gordon Frank, Parsippany, NJ, US
Berean Solutions, Inc.	Scott Thomas, Tupelo, MS, US
Berkeley Software Design, Inc.	Rob Kolstad, Colorado Springs, CO, US
Byte Size Computers	Robert Fowler, Berryville, AR, US
CacheFlow Inc.	Tom McCafferty, Palo Alto, CA, US
Canville Communications	Dan C. Rinnert, West Chester, OH, US
CapaNet, Inc.	Lee Capa, Natrona Hgts., PA, US
Capella Worldwide Networking, Inc.	Tom McCafferty, San Francisco, CA, US
Carolina Online Inc.	Gary Merck, Anderson, SC, US
carpeNet Information Technologies GmbH	Ray Davis, Hofheim, GERMANY
ChooseYourMail.com	Ian Oxman, Chicago, IL, US
Christy Industries, Inc.	Shayne Judkins, Fraser, MI, US
Clarity Connect Inc.	Joseph Lalley, Ithaca, NY, US
ClearGate Communications, Inc.	Gene Tye, Glastonbury, CT, US
Colomotion, Inc.	Peter Berns, San Francisco, CA, US
Connections Plus Internet Services	Dan Haughton, Sumter, SC, US
CrimsonWeb Information Systems	Jason Ingham, La Crescenta, CA, US
Critical Path Inc.	Shelley Alger, San Francisco, CA, US
Crocker Computer Consulting	Kevin Crocker, Edmonton, Alberta, CANADA
CSRlink, Inc. (Uplink)	Micah Brown, Montoursville, PA, US
CubeXS Private Limited	Aly Ramzan, Karachi Sind, PAKISTAN
Cumberland Internet, Inc.	David Glynn, Toledo, IL, US
Cyberix, Inc.	Kyoungbum Park, Warminster, PA, US